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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/697,465	10/30/2003	Rebecca Willey Griffin	18872	7960

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EXAMINER	
PIERCE, JEREMY R	

ART UNIT	PAPER NUMBER
1771	

DATE MAILED: 11/14/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No.	Applicant(s)	
	10/697,465	GRIFFIN ET AL.	
	Examiner	Art Unit	
	Jeremy R. Pierce	1771	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *08 October 2005*.

2a)☒ This action is **FINAL**. 2b)☐ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *1-22* is/are pending in the application.

4a) Of the above claim(s) *1-10* is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *11-22* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☐ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) Paper No(s)/Mail Date _____.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____.
5) ☐ Notice of Informal Patent Application (PTO-152)
6) ☐ Other: _____.

DETAILED ACTION

Response to Amendment

1. Applicant's amendment filed on October 8, 2005 has been entered. Claims 11 and 17 have been amended. Claims 1-22 remain pending with claims 1-10 withdrawn from consideration. Applicant's response is sufficient to withdraw the 35 USC 112 2nd paragraph rejection set forth in section 6 of the last Office Action.

Claim Rejections - 35 USC § 112

2. The following is a quotation of the second paragraph of 35 U.S.C. 112:

> The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

3. Claims 11-22 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claims 11 and 17 recite "An as-formed cross machine direction extensible nonwoven web." What does "as-formed" mean? At what processing step is the nonwoven fabric considered as-formed? Why would the web be considered "as-formed" following point bonding, but not be considered "as-formed" before being point bonded?

Claim Rejections - 35 USC § 102/103

4. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

> A person shall be entitled to a patent unless –
>
> (b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

5. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

6. Claims 11-22 are rejected under 35 U.S.C. 102(b) as anticipated by or, in the alternative, under 35 U.S.C. 103(a) as obvious over Abuto et al. (U.S. Patent No. 5,804,021).

Abuto et al. disclose a fibrous nonwoven laminate that exhibits elastic properties in at least one direction (Abstract). The facing layer comprises a continuous fiber spunbonded web made from bicomponent fibers (column 7, lines 25-44). The web may be thermally point bonded in a pattern (column 9, lines 30-33). The web is provided with extensibility in the cross machine direction by forming slits that are parallel to the machine direction (See Figures 1 and 2). In its unstretched condition, the web appears to have a uniform basis weight, since there is no pattern of varying density or weight. Abuto et al. do not specify a fiber diameter in microns for the spunbonded web. However, spunbonded fibers are generally greater than 10 microns, unless otherwise specified as fine fiber spunbond (See US 2004/0121110 to Schmidt et al. at paragraph 15). Also, Abuto et al. disclose using 2 denier polypropylene/polyester bicomponent

fibers (Example 1, column 13, lines 57-58). Denier can be converted to fiber diameter in microns using the teachings in paragraph 28 of US 2005/0079987 to Cartwright et al. The density for polyester is 1.38 g/cc and the density for polyethylene is 0.95 g/cc (See Adanur, Wellington Sears Handbook of Industrial Textiles, at p. 563). Assuming a 50/50 ratio of materials (density averages to 1.165 g/cc), a 2-denier bicomponent fiber would have a fiber diameter of about 15.6 microns. Even if one were to assume a greater presence of polyester (which would produce a smaller fiber diameter) of up to 100/0 (density equals 1.38), the fiber diameter would still be about 14.3 microns. So it is clear that the fibers of Abuto et al. anticipate the claim limitation of fiber diameter greater than 10 microns. It is also noted that Abuto et al. teach the fiber denier is not limited to 2, but may be up to 6 denier (column 13, lines 3-4).

With regard to claims 11-13 and 17-19, although Abuto et al. do not explicitly teach the limitations of force required to stretch the web in the cross machine direction as compared to the force required to stretch the web in the machine direction, it is reasonable to presume that said limitations are inherent to the invention. The nonwoven web of Abuto et al. uses a spunbonded web with crimped fibers that is thermally point bonded in a pattern and it is processed so that it is capable of stretching in the cross machine direction. There may be some difference in the processing steps used to create the final product. However, even though product-by-process claims are limited by and defined by the process, determination of patentability is based on the product itself. The patentability of a product does not depend on its method of production. If the product in the product-by-process claim is the same as or obvious

from a product of the prior art, the claim is unpatentable even though the prior product was made by a different process. MPEP § 2113 [R-1]. In this case, it is reasonable to assume the final product of Abuto et al. possesses Applicant's claimed property limitations for cross machine direction stretch. The burden is upon the Applicant to prove otherwise. In the alternative, the claimed limitations would obviously have been provided by the process disclosed by Abuto et al. because the reference teaches how to vary the stretching capability of the fabric (See column 11, line 64 – column 12, line 56). Note *In re Best*, 195 USPQ 433, footnote 4 (CCPA 1977) as to the providing of this rejection under 35 USC 103 in addition to the rejection made above under 35 USC 102.

With regard to claims 14 and 20, the fibers of the web are provided with latent crimps (column 8, lines 20-42). With regard to claims 15, 16, 21, and 22, the spunbonded web is bonded to an elastic film or nonwoven web (column 4, lines 27-30).

Response to Arguments

7. Applicant's arguments filed October 8, 2005 have been fully considered but they are not persuasive.

8. Applicant argues that the nonwoven web of Abuto et al. is a post-processed web wherein the extensibility is increased due to the post-processing operation. However, Applicant's argument is based on a processing limitation in a product claim. The product produced by Abuto et al. meets all of the claimed limitations despite being made by a different process. Once the examiner provides a rationale tending to show that the claimed product appears to be the same or similar to that of the prior art, although

produced by a different process, the burden shifts to applicant to come forward with evidence establishing an unobvious difference between the claimed product and the prior art product. *In re Marosi*, 710 F.2d 798, 802 (Fed. Cir. 1983).

9. Applicant argues that inherency cannot be presumed when the processing limitations are not the same. Applicant points out that Abuto et al. slit the nonwoven web to provide apertures. However, even if the products are created by a different process, the Examiner has shown that the claimed product appears to be similar to the product of Abuto et al. and the burden has now shifted to Applicant to prove otherwise. Applicant's claims do not preclude slits from being in the nonwoven fabric. The new claim limitation of an "as-formed" web does not preclude the web from having slits provided therein. It is unclear what "as-formed" is supposed to mean because, within independent claims 11 and 17, Applicant performs a further processing step to the fabric after it is formed (thermal point bonding). So the limitation cannot be read to preclude additional processing steps.

10. Applicant argues that the claimed property limitations would also not be obvious to provide because the section of Abuto et al. relied upon to teach how to vary the stretching capability of the fabric in the machine direction rather than the cross machine direction. However, Abuto et al. teaches that elasticity can be provided in either direction (See column 11, lines 27-50 and column 12, lines 26-56). The entire reference of Abuto et al. can be read to teach how to improve stretchability in either direction. Any method to improve one direction can be interpreted to be useful in improving the other direction.

Conclusion

11. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Jeremy R. Pierce whose telephone number is (571) 272-1479. The examiner can normally be reached on normal business hours, but works flextime hours.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Terrel Morris can be reached on (571) 272-1478. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR.

Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

JRP

Jeremy R. Pierce
November 9, 2005

ELIZABETH M. COLE
PRIMARY EXAMINER